U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 17 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The approval of the preference visa petition was revoked by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration due to a possible error by the Service Center in failing to provide petitioner's counsel with adverse evidence as required by regulation.

The petitioner is a physician. He seeks to employ the beneficiary permanently in the United States as an alterations tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director approved the petition on August 1, 1998. Following the director's approval, the beneficiary submitted an application for adjustment of status to lawful permanent resident (I-485) on April 23, 1999. Following an interview of the beneficiary and petitioner in connection with the I-485, the District Director, Baltimore, issued a Notice of Intent to Deny (NOID), on October 16, 2000. The NOID was based on the district director's preliminary determination that it did not appear that the beneficiary had a bona fide intent to commence employment with the petitioner, and because the evidence did not appear to establish that the petitioner had the ability to pay the proffered wage of $18,000 a year beginning on the priority date of the visa petition. Following a referral from the Baltimore District Office, the Director, Vermont Service Center, issued a Notice of Intent to Revoke (NOIR), the previously approved visa petition on September 12, 2002. Counsel submitted a response on October 10, 2002, requesting an extension of time to respond, and requesting a copy of the investigative report or other document which was the basis of the NOIR. On December 30, 2002, the director issued a decision revoking the previously approved petition, noting that no response had been received.

On appeal, counsel submits a brief statement in support of the appeal noting that the petitioner had not received a copy of any Investigative Report or Memorandum.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 205 of the Act, 8 USC § 1155 provides that an approved visa petition may be revoked at any time for good and sufficient cause. Once CIS has provided some evidence to show cause for revoking the petition, the alien retains the ultimate burden of proving eligibility. *Matter of Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F.2d 1305 (9th Cir. 1984).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 27, 1997. The proffered wage as stated on the Form ETA 750 is $8.99 per hour, which amounts to $18,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

Petitioner's counsel asserts on appeal that the petition was revoked without notifying the petitioner on what basis the petition was revoked as required by the regulations at 8 C.F.R. §§ 205.2(b) and (c). Counsel seeks a copy of the "Investigative Report or Memorandum that is the basis" of the revocation asserting that it was

never enclosed in the decision. We note that the file contains a September 12, 2002 NOIR that contains the following language: "A copy of the investigative report or memorandum that is the basis for this letter is enclosed." The record of proceeding does contain a memorandum that contains information which addresses findings contributing to the decision to revoke. Presumably, this memorandum is the one referenced in the director's NOIR. Following the issuance of the NOIR, counsel sent a response dated October 10, 2002, which noted that the NOIR lacked a copy of an investigative report or memorandum that was the basis for the revocation. The director subsequently issued a decision dated December 30, 2002 stating that the record reflected no response to the NOIR. The director's decision, however, did not acknowledge the October 10, 2002 response from counsel or otherwise indicate that it had in fact sent the evidence along with the NOIR.

Ordinarily we would assume that the information was sent along with the NOIR, especially since it was specifically referenced. However, the fact that no mention was made of the October 10, 2002 letter from counsel leads this office to believe that counsel's request was overlooked and that the Service Center may have inadvertently failed to send the evidence.[1]

Although the matter is being remanded to the director for further action, we note that petitioner has substantial issues to overcome related to the bona fides of the employment arrangement as well as the beneficiary's qualifications for the position offered. It appears that during the beneficiary's adjustment of status interview it became apparent that the beneficiary had performed only very occasional alteration work for the petitioner. However, the petitioner asserts that the beneficiary would be employed full-time as a tailor for the petitioner, apparently a private individual and his family. In addition, the record is devoid of evidence of the beneficiary's experience as a tailor for the petitioner or any other employer.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The petition is remanded for further consideration and action in accordance with the foregoing. In addition, the Service Center is directed to certify any subsequently issued decision to the AAO for review.

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[1] Although we are remanding the case to ensure that proper case processing is followed, it should be noted that counsel's Notice of Appeal and October 11, 2002 letter might overstate counsel and petitioner's lack of knowledge regarding the reasons underlying the revocation. It is clear from the file that the petitioner, the beneficiary, and counsel--an associate of Mr. Randall's--were present at the interview conducted by the Baltimore District office in connection with the beneficiary's application for adjustment of status. It is clear from the Notice of Intent to Revoke that it was information obtained during the interview that affected the determination of the beneficiary's qualifications for the position. In addition, the petitioner's counsel is also counsel for the beneficiary in connection with her I-485 and has received copies of the NOID in connection with that application and also submitted a response to the NOID addressing the bona fides of the position as well as issues relating to the petitioner's ability to pay the proffered wage.